

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

KEVIN JAMES MILLER, :
: :
Petitioner : :
: CIVIL NO. 1:CV-08-1893
vs. : :
: (Judge Caldwell)
JOSEPH P. NISH, et al., :
: :
Respondents. : :

M E M O R A N D U M

I. Introduction

Kevin James Miller has filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. Miller is challenging his 1998 conviction in the Dauphin County Court of Common Pleas for involuntary deviate sexual intercourse, statutory sexual assault, indecent assault, and the corruption of minors.

Miller filed a previous 2254 petition in 2005 so this petition will be dismissed as a second or successive petition that we lack jurisdiction to consider absent authorization from the Third Circuit. Miller's motion for appointment of counsel will be denied.

II. Background

On February 10, 1998, Miller pled guilty to the sexual offenses mentioned above. He was sentenced on November 16, 1998,

to an aggregate term of five to twenty years of incarceration.

He did not file a direct appeal. (Doc. 1, Petition).

On December 15, 1999, Miller filed his first petition for relief under the Pennsylvania Post Conviction Relief Act (PCRA). See 42 Pa. C.S.A §§ 9541-9546. On May 23, 2000, after his appointed PCRA counsel filed a "no merit" letter, the PCRA court denied the petition without a hearing. (Doc. 1, Petition). No appeal was filed. In August 2000, Miller filed a second PCRA petition which was dismissed on September 8, 2000, as untimely. Miller appealed this denial to the Superior Court of Pennsylvania which dismissed the appeal after Petitioner failed to file a brief. (*Id.*) On September 12, 2002, Miller filed a third petition, which was denied on December 31, 2002, as untimely. On October 20, 2003, the superior court affirmed. (*Id.* at R. 38). In doing so, the superior court found no exceptions for the untimely petition and rejected Miller's argument that this latest petition was an extension of his first timely filed petition.¹ (*Id.*) On April 26, 2004, the Supreme Court of Pennsylvania denied Miller's petition for allowance of appeal. (*Id.*)

¹ "Since no timely PCRA petition exists to which this untimely petition can be considered an extension, there was nothing to extend." (*Id.* at p. 6).

On April 19, 2005, Miller filed his first habeas corpus petition pursuant to 28 U.S.C. § 2254. (*Id.* at R. 44). It was dismissed as untimely on August 26, 2005. (*Id.*) On November 3, 2005, the Third Circuit denied Miller's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) on the basis that "reasonable jurists would not debate whether the District Court was correct in dismissing Kevin Miller's petition for writ of habeas corpus as time barred." (*Id.* at R. 50).

On September 27, 2006, Miller filed his fourth PCRA petition. (*Id.* at R. 58). The PCRA court dismissed the petition as untimely on October 25, 2006. (*Id.*) The superior court denied his appeal on August 14, 2007. The Pennsylvania Supreme Court denied Miller's Petition for Allowance of Appeal on April 2, 2008. (*Id.* at R. 62).

Miller's present habeas petition was filed on October 14, 2008.

III. Discussion

Pursuant to 28 U.S.C. § 2244(b)(3)(A), a petitioner must obtain permission from the appropriate court of appeals before filing a second or successive habeas corpus petition in federal district court. If a petitioner erroneously filed a second or successive habeas petition in a district court without

first obtaining permission from the court of appeals, "the district court's only option is to dismiss the petition or transfer it to the court of appeals pursuant to 28 U.S.C. § 1631." *Robinson v. Johnson*, 313 F.3d 128, 139 (3d Cir. 2002).

In this case, Miller acknowledges that he previously initiated a habeas corpus action before this Court. *See Miller v. Colleran*, No. 1:CV-05-0789 (M.D. Pa. 2005). The prior action was denied as untimely, but it still counts as his first petition. *See Murray v. Greiner*, 394 F.3d 78, 81 (2d Cir. 2005)(holding that "dismissal of a § 2254 petition for failure to comply with the one-year statute of limitations constitutes an adjudication on the merits that renders future petitions under § 2254 challenging the same conviction 'second or successive' petitions under § 2244(b)"). We therefore lack jurisdiction to consider it, absent the Third Circuit's authorization for us to do so. *See Burton v. Stewart*, 549 U.S. 147, ___, 127 S.Ct. 793, 796, 166 L.Ed.2d 628 (2007)(where a state prisoner filed a second or successive habeas petition, and "did not seek or obtain authorization to file in the District Court, the District Court never had jurisdiction to consider it in the first place.").

We will issue an order denying the petition. We will also deny a certificate of appealability, based on the above analysis. However, Petitioner is advised that he has the right

for thirty (30) days to appeal our order denying his petition, see 28 U.S.C. § 2253(a); Fed. R. App. P. 4(a)(1)(A), and that our denial of a certificate of appealability does not prevent him from doing so, as long as he also seeks a certificate of appealability from the court of appeals. See Federal Rule of Appellate Procedure 22; Local Rule of Appellate Procedure 22.1. appropriate order.

/s/William W. Caldwell
William W. Caldwell
United States District Judge

Date: November 6, 2008

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

KEVIN JAMES MILLER, :
: :
Petitioner : CIVIL NO. 1:CV-08-1893
: :
vs. : (Judge Caldwell)
: :
JOSEPH P. NISH, et al., :
: :
Respondents.

O R D E R

AND NOW, this 6th day of November, 2008, upon
consideration of the 28 U.S.C. § 2254 petition, based on the
accompanying memorandum, it is ordered that:

1. The petition for writ of habeas corpus (doc. 1) is dismissed for lack of jurisdiction.
2. Miller's Motion for Appointment of Counsel (doc. 5) is denied as moot.
3. A certificate of appealability is denied.
4. The Clerk of Court shall close this file.

/s/William W. Caldwell
William W. Caldwell
United States District Judge